PERSUASION

published by
PERSUASION, INC.
260 west 86 street, n.y.c.

35¢

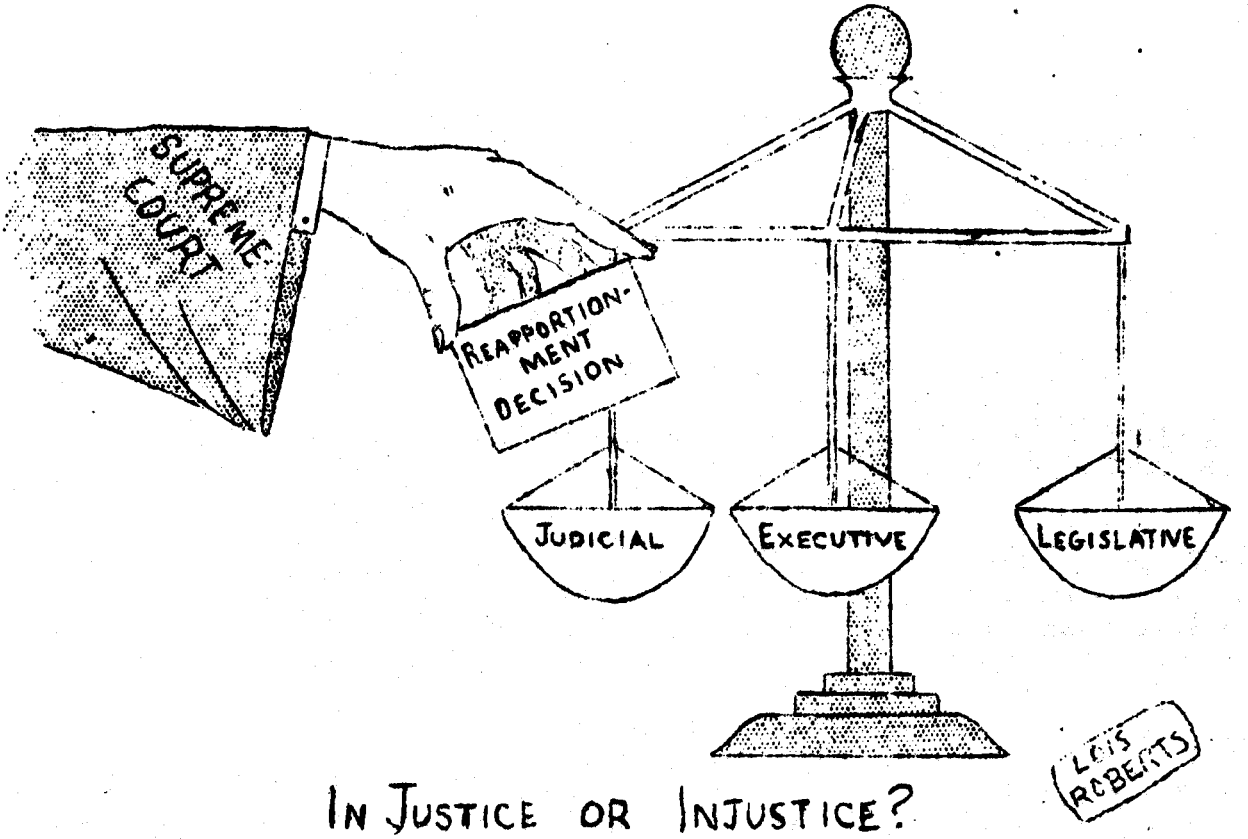
JOAN KENNEDY TAYLOR, EDITOR

distributed by the
Metropolitan Young Republican Club

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Volume II, No. 5 May, 1965

V I E W S



IN JUSTICE OR INJUSTICE?

REAPPORTIONMENT

In June of 1964 the Supreme Court of the United States decided that

"We hold as a basic constitutional standard, the Equal Protection Clause [of the Fourteenth Amendment] requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis."

To evaluate this reapportionment decision, which has caused so much discussion and controversy, we must examine three main areas, which may be summarized in the questions: Is the Court right? If it is not, is it improving on the Constitution? and Does the Court have the right?

© 1965 Persuasion, Inc.
260 West 86th St., N.Y., N.Y.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Under consideration in the decision were the legislatures of six different states. Although the facts varied from state to state, the majority opinion in Reynolds v. Sims [Alabama], written by Chief Justice Warren, is the basis for all six decisions and requires drastic changes in the legislatures of most of the fifty states.

In Alabama there was a State Constitution which required reapportionment on a population basis every ten years. No apportionment had taken place since 1903. The story in Colorado was quite different. In 1962, two-thirds of the voters rejected a proposed constitutional amendment which would have apportioned representatives in both houses on a population basis and endorsed an amendment which apportioned representatives in one house of the bicameral legislature on a population basis, in the other, on a geographical basis.

Justice Harlan was the lone dissenter in all cases, believing that the Supreme Court should not involve itself in controversies concerning apportionment of state legislatures. Justices Clark and Stewart, believing that the Court should strike down only arbitrary and capricious apportionment schemes, dissented where they felt the existing apportionment schemes were reasonable.

The majority opinion in the leading case of Reynolds v. Sims is based on two major premises: 1) The right not only to vote but to have one's vote equal to the vote of all other men is fundamental to our society. 2) Since the equal protection clause of the Fourteenth Amendment has historically been taken to require that all citizens in the same "class" (by which is meant any group which can be properly singled out by law) be treated alike, in questions of apportionment of legislatures all people are in the same class.

Can either of these premises stand up if they are examined in the light of the facts and Constitution? Let us examine the first one.

Clearly, if equal representation on every level of government is required in order for one's vote to be equal to that of all other men, the right to "equal representation" is far from fundamental to our society.

The Court attempts to answer the challenge presented by the apportionment of our federal legislature by saying that "a compromise between the larger and smaller States on this matter averted a deadlock in the Constitutional Convention which had threatened to abort the birth of our Nation." How is it possible that a fundamental principle of our government would have made the formation of our government impossible? And if it is true, as stated in Reynolds v. Sims, that "the original constitutions of 36 of our states provided that representation in both houses of the legislatures would be based completely or predominantly on population," then fully fourteen state constitutions did not contain such a provision. In addition, the Electoral College

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

effectively prevents equal weighting of votes for the President of the United States. There is therefore no support for the claim that the Supreme Court, in stating that equal suffrage requires that votes never be weighted, has merely given voice to a fundamental premise of our society.

The Court is of the opinion that if 500 residents of County A elect Mr. A, and 700 residents of County B elect Mr. B, the residents of County B are their votes diluted and debased. That the principle of "one man, one vote" is being violated.

"One man, one vote" is a concept first articulated in the case of Gray v. Sanders (March 1963) dealing with the Georgia County Unit System: a system much like the Electoral College where the 500 people in County A and 700 in County B are each counted as a unit which casts one vote toward the election of a Governor whose job it is to represent all of the people. Now, here it is true that the residents of County B are being given for all practical purposes one-and-a-fraction votes each (This is not to say that even this is unconstitutional; it is simply to say that it is true).

But if--and this is the situation to which the reapportionment decisions refer--County A elects one Assemblyman and County B elects one Assemblyman, is the effect fully the same? Mr. A could have been elected unanimously by all the citizens of County A, and would therefore represent the views of 500 people. Mr. B could have been elected by 51% of the vote, which means that he represents the views of 357 people. As Justice Stewart pointed out, even under the system demanded by the Supreme Court it is theoretically possible that 26% of the population will elect a majority of the representatives. All that is needed to do so is 51% of the population in 51% of the districts. Whenever men are elected by simple majority there will be a wide variation in the percentage of actual support that they have in their constituencies.

After these votes are filtered, so to speak, through a representative, the situation is quite different from a unit system, and the concept of "one man, one vote" no longer accurately fits. On any one issue, the candidate from the smaller constituency may have more people supporting his position. If we wish to guarantee to each individual an equal voice in the government, we shall have to have a referendum on each bill which is submitted to the legislature.

But is it a fact nonetheless that the Fourteenth Amendment requires the result the Court has reached? Is it true that with respect to legislative apportionment all citizens are in the same class, because they stand in the same relation to the particular act of apportionment?

If the function of government were limited so severely as to prevent the legislature from dealing with any economic issues at all (including the issue of taxation) then all citizens might conceivably be in the same class in respect to each and every

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

legislative act. But no state in the Union has such a government. All states deal with such questions as highways, schools, and the taxing of one kind of property instead of another. At the present time there are special restrictions or benefits applicable to every conceivable economic group: grocers, landlords, landlords of buildings more than five stories high, milk distributors, laundries, dry cleaners--the list is very long.

Time and again the Supreme Court has held that such laws do not deny equal protection of the law because they are based on "reasonable" classifications. But the citizens following these specific economic interests and occupations are not in the same class with respect to each law, and so they are not, in the aggregate, in the same class with respect to the legislature itself.

In fact, if the differing economic interests of different areas are not represented in the legislature, there is a real danger presented to the rural population when the overwhelming majority of residents of a given state are city dwellers. On certain issues, vital to them, they may find themselves effectively disenfranchised. Would they in such a case truly have equal protection of the law?

Many supporters of population-based apportionment support it in the hope that it will result in a more equitable use of tax monies. There is no guarantee however that the representatives from urban areas will have a greater devotion to justice--as opposed to a determination to be reelected--than their rural brethren. Nor is the word "equitable" necessarily synonymous with the word "equal." Many present governmental activities are of such a nature as to be necessarily more expensive per capita in a sparsely settled area than in a very crowded area. Highways, schools, hospitals, can not be built to conveniently accommodate as many farmers as city dwellers.

A legislature is a means to the end of good government. And a legislature is well apportioned or malapportioned in accord with your concept of what is a good government. If the standard is majoritarian rule, possibly limited by certain constitutional safeguards, then apportioned on a basis of population alone is appropriate But if you hold that the function of a republic is solely the protection of rights, by providing for the common defense, for police protection and for courts of law, then apportionment on a basis both of population (in one house of the legislature) and of political subdivisions such as counties (in the other house) is a better guarantee that rights will be protected.

In any given situation it would be necessary to see the legislature in the context of such factors as the governmental structure, the topography, the population concentration, and population uniformity. For example, if the governmental structure is such that a state is subdivided into counties, each of which receives funds from the state with which to provide police protection and to administer the courts, then each county should have at least one representative in the legislature to act as liaison

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

between the county-as-an-administration and the state government. Such liaison must exist if any sort of political efficiency is maintained--and if it is not provided for by the apportionment of elected officials, it will be provided for by local bosses or by appointed officials from the central state government, neither of which are responsible to the electorate.

In examining the question of reapportionment, the reader may be puzzled as to where the Court specifically derived its decision. The Fourteenth Amendment reads:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." (Italics mine.)

The evidence supports Justice Stewart, dissenting in the New York and Colorado cases:

". . . to put the matter plainly, there is nothing in all the history of this Court's decisions which supports this constitutional rule. The Court's draconian pronouncement which makes unconstitutional the legislatures of most of the fifty states finds no support in the words of the Constitution, in any prior decision of this Court, or in the 175-year political history of our Federal Union."

Further, Section 2 of the Fourteenth Amendment provides that in a state where the right to vote for either federal or state officials is denied or in any way abridged "to any of the male members of such State, being of twenty-one years of age, and citizens of the United States," the representation of that state in the House of Representatives shall be reduced in proportion.

Section 5 provides that the Congress shall have the power to enforce the Amendment by appropriate legislation.

This brings us to the important question, unanswered by the Court, of how they concluded that Sections 2 and 5 were mere suggestions and not specific limitations. Why did they read into this, "The Supreme Court may enforce by appropriate legislation," when it is a fundamental principle of our government that the Courts were to be completely divorced from the legislative process? Although there may be areas of the Constitution which are less clear than others, one absolutely clear constitutional intention was to separate the three branches of government, and to limit the powers that all branches have over the citizens.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

This is why we have a constitution. Private disputes, where there is no constitutional guidance, may properly be adjudged on a basis of common law and precedent, but when the government acts, it must do so in a manner consistent with the Constitution.

Political science today is often characterized by the inability to distinguish differences in degree from differences in kind. For this reason, the concepts of "judicial review" and "judicial legislation" have come to be lumped together under the name "judicial activism."

Rule by law, not by men, is best achieved by having a written constitution, strictly adhered to, and difficult to amend. This necessitates a Court to review the constitutionality of all legislation, otherwise every law would in effect be amending the constitution. This is what is meant by "judicial review." This power is by its nature essentially a negative power.

Negative, but far from negligible. If the Executive wished to continue to enforce an unconstitutional law, he would have no courts to find that violations of the law had taken place. No action which used the legal structure in any way would enable the Executive to perpetuate the unconstitutional law--he would have to act outside the law. Which means, he would have to set himself up as a dictator.

It is for this reason that when, and only when, the Constitution is explicit or clearly implicit, or where the debates and circumstances surrounding the adoption of a portion of the Constitution clearly lead to a given commandment, that the Court may, in the exercise of its power of judicial review, properly issue a positive pronouncement to the effect--only this action is constitutional. Any other positive directive on the part of the Supreme Court is "judicial legislation." But one fundamental principle on which the United States government does rest is that all legislators shall be elected. It is not for the appointed judiciary to legislate. Judicial legislation is by its very nature antithetical to the democratic process. If nine appointed men can make the laws--you have tyranny.

The Court has been much criticized for this reapportionment decision and for its "activist" trend. Voices are heard throughout the land saying that the power of judicial review should be used with more restraint. Critics forget that it is right and proper that an unconstitutional law be considered a legal nullity--that is, it should be considered a non-existent law--and that the Court should never use restraint in protecting the Constitution of the United States of America.

I said "protecting." I didn't say "amending."

When Congress passes an unconstitutional law, and the Supreme Court declares it to be so, the Supreme Court will usually have the power to enforce its decision.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Remember, any policeman who arrested a man for breaking an invalidated law would be liable for malicious prosecution. And every judge would know that the defendant coul appeal from his decision and have it reversed by the Supreme Court. But if the judiciary chooses to legislate, it will usually have no means for enforcing its decrees.

This fact is an essential element of our system of checks and balances. The President takes an oath to uphold the Constitution of the United States and the laws of the United States. He does not swear to enforce the decrees of the courts. Andrew Jackson was acting in a proper legal and constitutional manner when he allegedly said, "Justice Marshall decided it, now let him enforce it." In fact, it was this very inability of the Court to enforce its decisions which was a major argument at the time of the Constitutional Convention and in the Federalist Papers for having a Supreme Court which was not in any way subject to the popular vote.

Our history abounds with conflicts between Congress and the Court. The Founding Fathers foresaw this; they counted on it. They reasoned that each branch of government would jealously guard against usurpation of its power, and thus no one branch could ever become too powerful. Today this idea is being replaced by the idea of a nationalistic consensus, of not rocking the government boat. But our law provides for something else.

One legally appropriate attitude for the Executive Branch of government to take, when the Supreme Court attempts to overstep its function and to order legislation, is to refuse to enforce such a decree. There is absolutely no constitutional mandate for the Supreme Court to have the power to mold this nation.

Article IV, Section 4 of the Constitution guarantees every state a republican form of government. But throughout its history, the Court has refused to define the term "republican form."

In Plato's Republic, only the Philosopher Kings were considered fit to decide on state matters, and the inferior men had their lives ordered for them by their betters.

Is the Supreme Court now to define "republican form" (in action, if not in words) as Plato defined it? If the other branches of our government default on the possibility of action, then wise, learned men, unburdened by practical concerns (or by a need to please those who have practical concerns) will be free to shape our government into their ideal.

--Sheila Silverman

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

R E V I E W S

THE MAKING OF A LOSER

The Agony of the G.O.P., by Robert D. Novak, Macmillan Co., New York, 1964.

Though the story ends with Goldwater's victory in July, this book is the story of what led to his defeat, and the party's, in November.

Robert Novak, the co-author of "Inside Report," a column in the New York Herald Tribune, sees the schism in the Republican party as the cause of not only its recent defeat in 1964, but of its history of defeat during the past decades.

It started at the turn of the century. The Republican party had been the dominant one in the country for half a century, and in a way, that was the cause of its downfall. Many of the progressives of the day, filled with ideas on social reform, chose to join the one party that was numerically strong enough to get things done. They were not really welcome, and a widening gulf began to grow between the conservative and the progressive members of the party. The split became open when William Howard Taft was nominated Republican candidate for the presidency. Theodore Roosevelt and his progressives bolted and formed the Bull Moose party, and Roosevelt ran against Taft. He beat him handily, garnering a clear majority of the 55% of the vote the two men drew. Unfortunately, there happened to be Democrat running, too--Woodrow Wilson became president on the remaining 45%.

To a large extent, the two wings of the Republican party have been at each other's throats ever since, seldom uniting to face the Democratic party.

The conservatives grew more and more restive as the "expedient" campaigns of Willkie and Dewey failed, and were determined that in 1952, they were going to regain control of the party and nominate Robert Taft. Their failure to do this, and the Eisenhower victory postponed matters, but it did no more than that. Eisenhower had neither the interest nor the political wisdom necessary for uniting the party, and Nixon, though popular, never achieved more than a "superficial unanimity"--which he promptly destroyed when he allowed Rockefeller to have considerable say in the drafting of the 1960 platform planks relating to such controversial issues as civil rights. The conservatives regarded this as a sell-out.

It was against this background that Goldwater, Rockefeller, Nixon, Lodge, Scranton, and Romney were to play out the unprecedented political farce of 1964. From here on, Novak's book is the story of a debacle in the making.

Until Kennedy's assassination, Goldwater seemed the inevitable candidate. The numerically superior conservative wing of the party had been without a voice in national

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

politics for far too long. Further, he had the advantage of an enthusiastic backing in the South, where Kennedy, though a Democrat, was hardly regarded as the ideal president.

Rockefeller wanted the nomination, and he worked hard for it. However, in Mr. Novak's opinion, he was not the most brilliant potential candidate in the world. Though he went so far as to scrape up a friendship of sorts with Goldwater (who was even temporarily convinced that he could represent the conservative element of the party, and who might have supported him had things turned out differently) he was never really able to unite the party behind him. Many conservative Republicans felt that he was scarcely better than a warmed-over Democrat in disguise. Novak considers that this attitude was in large part responsible for the furor that arose over his too-quick remarriage, though he points out that had Rockefeller waited for six months or so, the public reaction might not have been as violent as it was.

Rockefeller jumped to the totally unwarranted conclusion that Goldwater was behind all the fussing and fulminating over the remarriage, that he was stirring it up and keeping it alive. Accordingly, he attacked the Senator, thus cutting himself off once and for all from the conservative wing he had so assiduously wooed for so long.

Goldwater didn't want the nomination, and did not work for it until fairly late in the game. Even then, his efforts in his own behalf were disorganized and inefficient. "Just pooping around," he called it, and the phrase was all too apt. He had never been willing to spend as much time and effort as Rockefeller had been. He was careless about what he said and to whom, to the point of unnecessarily alienating many who would have otherwise supported him.

With Kennedy's death, the picture changed. Goldwater no longer had the advantage of the Southern support--Johnson was a Southerner and a Democrat, which gave him an undeniable edge in that section. Republicans agreed that what was wanted was a Republican candidate who, like Kennedy, had enough of a following in the North to be able to disregard the South.

Still----what did the Republican party have to offer? Rockefeller had committed political suicide with his hasty remarriage, and Nixon was considered too close to him to be at all popular with the conservatives. Scranton didn't want to run and did an excellent job of tripping up his followers every time they tried to put his hat into the ring. Romney, who would have welcomed the nomination, was suffering from troubles at home that tied his hands and lost him enough prestige to make party leaders wary of him. And Lodge----well, who ever knew what Lodge wanted to do?

Furthermore, the draft-Goldwater organization was a very efficient one. His supporters down to the precinct levels and right up to the top were activists, as

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

compared to the relatively lukewarm support the other potential candidates received in most parts of the country. They set out literally to kidnap the political machinery in order to guarantee him the nomination, often snaring delegates by no more than a hair's breadth. Novak cites Fairfax County, Virginia, as a prime example of their strategy all over the country: "The decisive battleground was the fashionable Lake Barcroft District, whose district convention was captured by the Goldwater forces by a single vote. This victory gave Goldwater control of the Fairfax County delegates to the tenth Congressional District, which in turn elected two Goldwater delegates to the National Convention."

While the other candidates and/or their followers were working to attract the electorate, the Goldwater people were working to control the party mechanism needed to sew up the Convention. Whether or not Goldwater could have swung the voters to his side in those early pre-Convention days had he and followers concentrated on that, is debatable. And irrelevant. While he was piling up delegates to the Convention, the voters were not for him. Public opinion polls are cited in great quantity at different times and places to show this. Even more reliably indicative, however, are the results of some of the primary elections. Illinois, for example, is a state in which write-in voting is hard to do. In that primary, only Margaret Chase Smith opposed him on the ballot. He received 512,000 votes, she received 209,000, and there were 105,000 write-ins. Write-ins that were counted, that is. The total counted vote was 826,000--but something over a million Republicans turned out for the primary--and Illinois law does not require that write-in votes be counted at all. In short, Goldwater received only 49% of the Republican vote----and Illinois was considered strong Goldwater territory.

Novak covers other issues, such as the attempt of some members of the party to cash in on racial prejudice, the effect of Goldwater's early "hip-shots" on social security, etc., but he doesn't dwell on them at great length. He is far more concerned with the history of the different plans and campaign leaders, and with statistics showing voter reactions and poll results and the like.

His book is far too superficial a treatment of so serious a subject, and the superficiality is the result of the most common view of politics in this country today. It is a mistaken view, but one that ought to be understood by any serious student of politics.

It is not until the last chapter that Novak mentions the subject of political philosophy. Rockefeller, he says, is the archtype of the pragmatic approach which is so prevalent in Republican politics these days, and people--at least some people--are getting tired of that approach. He observes that if Rockefeller or Scranton or any of the others had "had some nonpragmatic moral philosophy to oppose Goldwater and his conservatism, they might have survived the bad breaks."

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

This leaves one with a good many questions: What, in Mr. Novak's view, is a conservative (or as he says "unwashed") Republican, and what is a liberal? What is the nature of the schism that has divided them for so long? When Novak speaks of resolving it, precisely what is he talking about? And does he fail to discuss these things because he considers them self-evident--or irrelevant?

I think it must be a little of both. "It is not enough to dismiss the Goldwaterites as kooks," he observes. The implication is that they are, of course, but that there is more to it than that. The "kooks" opponents need a non-pragmatic moral philosophy with which to combat them. Novak does not say what this would consist of, or examine the question of whether or not there would be anything left in Republican liberal thought, once you removed the pragmatism, to attract anyone, let alone to cancel out the "kooks."

The <u>contents</u> of ideas seem to be what is irrelevant in Mr. Novak's viewpoint. They are weapons. In a barroom brawl, one doesn't care what is in the bottle one picks up as a weapon, the finest vintage champagne or a third-rate beer. Just let the bottle be big enough and of a convenient shape for gripping and swinging.

This view of the place of ideas in politics is taken completely for granted in political circles. Save for the danger that they might rouse some fanatics to interfere with the smooth running of party machinery (as in this case), ideas simply are not considered important. The power plays, the personality ploys, the presence or absence of mustaches or marriages, the quantities of babies kissed--all these are considered to have much more to do with the results of any election than whether or not the candidates ever even had any ideas.

At times, it does seem that nothing but irrelevancies matter in politics, that they outweigh the issues and principles, the qualifications and records of candidates, everything that a rational individual would expect to be most important. At times, the whole field seems hopeless and incomprehensible.

In fact, it is neither. There are two issues involved: reasons for or against a candidate or a position, and the standards by which to judge those reasons. The absence of any clear reason for choosing one alternative over another leaves a vacuum which any combination of random factors may fill.

Without reasons, then, standards cannot operate. But what of standards? Is it true, as is so often taken for granted, that many voters haven't the knowledge they need in order to have any meaningful standards? In a sense, yes. There are reasons for this--from plain laziness to lack of time. And lack of motivation. Where a man does not believe he can do anything or be effective in any way, he is not motivated to try. And where a man believes what so many politicians have been saying for so long--that politics is simply too complex for anyone but an expert to understand, he is not going to try to learn. He will accept what he is told.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

That doesn't mean that he will be happy with what he is told, or that he is part of an unreachable mass of turned-off minds. There is still another principle that operates here: except where some neurotic involvement prevents, people prefer sense to non-sense. Given two sides of an issue--one of which consists of pointless generalities, what I call vacuum factors, and reminders that such issues are too complex for them to understand; and the other of which consists of well-reasoned and well-presented arguments--people will generally chose the second.

This does not mean that getting through to them with an idea will be easy. Goldwater didn't find it so, and his scatter-shot method of presenting fragments of arguments, irrelevancies and unsupported conclusions is a prime example of how not to go about it. On the other hand, one of the most impressive examples of communicating ideas to the voter I have ever heard was the Ronald Reagan speech in the Goldwater campaign. It was a well-ordered presentation of ideas and the facts that supported them--ideas, not bromides, reasons, not assurances that one could not understand such complex issues.

Politics properly belongs to the realm of ideas, and as in any other field, a good idea, soundly reasoned and presented well enough and often enough so that it can be understood, will rule the vacuum factors right out of consideration. Once those whose business it is--whether they are office holders, candidates, or commentators like Mr. Novak--realize that, this country's politics will be in much better shape than it is now or has ever been.

--Avis Brick

* * * * *

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED